***Proposed Ban Puts Justices In ’Mortal Kombat’ Ring***

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By Robert Barnes

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At the end of an animated and sometimes contentious Supreme Court argument Tuesday about whether the Constitution protects an emerging new art form - the violent video game - only one thing was clear:

Torturing or maiming a Vulcan is not enough to trigger California's law prohibiting the sale of such games to minors. The damage, the state's attorney told the court, has to be done to "an image of a human being."

Other than that, it was a struggle on the bench between justices who indicated that California has a right to keep juveniles from buying games with images of almost unimaginable brutality, and others who think that the Constitution doesn't allow the government to restrict violent depictions.

It was the court's first examination of a phenomenon that has reached into two-thirds of American homes and spawned an industry that exceeds $10 billion a year. Social scientists debate the long-term impact of violent games, parents worry about a technology their children understand better than they do, and some states want to ban sales to juveniles, or at least to have the option in the future.

Modern technology and cultural trends are not always the court's strong suits. Crime novels, violent movies and rap lyrics all figured into Tuesday's argument, as the justices debated whether restrictions on the sale of sexual materials to minors should be expanded to include depictions of violence.

The argument's essence was captured in an exchange between Justice Samuel A. Alito Jr., who seemed sympathetic to California, and lawyer Paul M. Smith, who said the First Amendment protects his clients, the game producers.

"We have here a new . . . medium that cannot possibly have been envisioned at the time when the First Amendment was ratified," Alito told Smith.

"We do have a new medium here, Your Honor," Smith agreed. "But we have a history in this country of new mediums coming along and people vastly overreacting to them, thinking the sky is falling [and] our children are all going to be turned into criminals."

He mentioned congressional hearings in the 1950s about the dangers of comic books.

A majority of the justices appeared to have big reservations about California's law, which was passed in 2005 and signed by Gov. Arnold Schwarzenegger (R). The irony that the plaintiff had starred in "Conan the Barbarian" and "The Terminator" was noted in signs carried outside by gamer demonstrators. The law has been blocked by lower courts.

It would prohibit the sale or rental to anyone younger than 18 of a video game that allows a player the option of "killing, maiming, dismembering or sexually assaulting" a human image.

Borrowing from the court's obscenity jurisprudence, the game as a whole would have to be judged to appeal to the deviant or morbid interest of minors, be patently offensive to the community as it relates to minors and lack serious "literary, artistic, political or scientific value for minors." Each violation could result in a $1,000 penalty for retailers.

Justice Antonin Scalia led the aggressive questioning of Zackery P. Morazzini, a deputy California attorney general. Morazzini said the "deviant level of violence" in some video games "can be no less harmful to the development of minors" than sexual materials. The court ruled in 1968 that those could not be sold to minors.

But Scalia said that besides the law being unworkably vague, "I am concerned with the First Amendment, which says Congress shall make no law abridging the freedom of speech."

He continued: "And it was always understood that the freedom of speech did not include obscenity. It has never been understood that the freedom of speech did not include portrayals of violence."

That led Alito to playfully poke at Scalia's theory of "originalism" - relying on the founders' concept of what the Constitution meant at the time.

"I think what Justice Scalia wants to know is what James Madison thought about video games," Alito said to Morazzini, while courtroom spectators laughed.

"No, I want to know what James Madison thought about violence," Scalia responded.

Morazzini said California's interest is in helping parents keep some images from their children. He cited studies that have shown video games to be different from other media in that the player is involved in directing violence depicted on the screen.

But other justices wondered where the line would be drawn.

"Could you get rid of rap music?" Justice Sonia Sotomayor asked. Justice Elena Kagan appeared skeptical of the idea that playing the games can lead to violent behavior, estimating that most of the Supreme Court clerks probably grew up playing the "iconic" video game "Mortal Kombat."

And several pointed out that California's law makes no distinctions among minors, be they 10 years old or 17.

But three justices - Chief Justice John G. Roberts Jr., Stephen G. Breyer and Alito - seemed particularly disturbed by the games and the argument that states have no power to keep them from juveniles.

"So your position is that the First Amendment does not, cannot, no matter what type of law - whether this one is vague or not - that the state legislature cannot pass a law that says you may not sell to a 10-year-old a video in which they set schoolgirls on fire?" Roberts asked Smith.

Smith said the court noted just last term that the First Amendment protects even distasteful speech in declaring unconstitutional a federal law banning depictions of animal cruelty.

He added that the game industry has acted to keep the most violent games from reaching children, with parental controls on gaming machines and more sophisticated content labeling than what California proposed.

Roberts, the only justice with young children, replied that "any 13-year-old can bypass parental controls in about five minutes."

Breyer suggested that states can go further than what the industry imposes on itself.

If parents want their child to have a game in which he can "impose gratuitous, painful, excruciating, torturing violence upon small children and women, perhaps they have the right," he said. But "why isn't it common sense to say a state has the right to say, 'Parent, if you want that for your 13-year-old, you go buy it yourself.'"

Proposed Video Ban Questions:

1. Define: contentious, trigger, juvenile, phenomenon, medium, deviant, morbid, jurisprudence, originalism

2. Why do kids want to play video games depicting “images of almost unimaginable brutality”?

3. Why would the attorney general think the Court is more likely to rule the ban unconstitutional if it covers “torturing or maiming” Vulcans and other fictional, non-human beings?

4. What are the reasons for banning brutal video games? Do these reasons apply to depicted brutality to humanoids as well as humans? What about cruelty to animals?

5. “The game as a whole would have to be judged to appeal to the deviant or morbid interest of minors, be patently offensive to the community as it relates to minors and lack serious ‘literary, artistic, political or scientific value for minors.’” Why would these things prevent a game from being considered free speech?

6. How does Justice Scalia think we should determine what “free speech” means?

7. “No, I want to know what James Madison thought about violence.” What distinction does Justice Scalia make? Why did Justices Alito and Scalia mention James Madison?

8. The California attorney general said that very violent video games could be “harmful to the development of minors.” What kind of development would they harm? Do you think this is true? Imagine if you had kids. What would you think if they played such games frequently?

9. “Justice Elena Kagan appeared skeptical of the idea that playing the games can lead to violent behavior…” Does the game have to lead to violent behavior in order to “appeal to the deviant or morbid interest of minors” and be “patently offensive to the community as it relates to minors”? Does it have to lead to violence in order to be “harmful to the development of minors”?

10. “The court ruled in 1968 that those could not be sold to minors.” What powers do courts have? Could the court have really ruled such a thing? What did the author of the article mean?